

Negotiating damages in English contract law

Article (Published Version)

Harder, Sirko (2020) Negotiating damages in English contract law. Florida International University Law Review, 14 (1). a7 45-63. ISSN 2643-7767

This version is available from Sussex Research Online: <http://sro.sussex.ac.uk/id/eprint/92485/>

This document is made available in accordance with publisher policies and may differ from the published version or from the version of record. If you wish to cite this item you are advised to consult the publisher's version. Please see the URL above for details on accessing the published version.

Copyright and reuse:

Sussex Research Online is a digital repository of the research output of the University.

Copyright and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable, the material made available in SRO has been checked for eligibility before being made available.

Copies of full text items generally can be reproduced, displayed or performed and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

2020

Negotiating Damages in English Contract Law

Sirko Harder
Sussex Law School

Follow this and additional works at: <https://ecollections.law.fiu.edu/lawreview>

 Part of the [Other Law Commons](#)

Online ISSN: 2643-7759

Recommended Citation

Sirko Harder, *Negotiating Damages in English Contract Law*, 14 FIU L. Rev. 45 (2020).
Available at: <https://ecollections.law.fiu.edu/lawreview/vol14/iss1/7>

This Article is brought to you for free and open access by eCollections. It has been accepted for inclusion in FIU Law Review by an authorized editor of eCollections. For more information, please contact lisdavis@fiu.edu.

NEGOTIATING DAMAGES IN ENGLISH CONTRACT LAW

Sirko Harder*

I.	Introduction	45
II.	Negotiating Damages in English Contract Law Before <i>One Step (Support) Ltd. v. Morris-Garner</i>	47
III.	<i>One Step (Support) Ltd. v. Morris-Garner</i> —Facts and Decision	49
IV.	<i>One Step (Support) Ltd. v. Morris-Garner</i> —Critique	53
V.	Conclusion.....	61

I. INTRODUCTION

In 2018, in *One Step (Support) Ltd. v. Morris-Garner*,¹ the Supreme Court of the United Kingdom laid down the circumstances in which damages for breach of contract may be measured by reference to the amount of the fee that the innocent party (the claimant) could have demanded from the breaching party (the defendant) for a release of the latter from the relevant obligation. The Court expressed the view that the award of such a notional fee, which it labelled “negotiating damages,”² compensates for the loss of the value of the claimant’s right to control the use of an asset.³ This article, which adopts the Court’s terminology and compensatory characterization of negotiating damages,⁴ will briefly recount the development of that remedy in English contract law and evaluate the Supreme Court’s decision in *Morris-Garner*.

Beforehand, it is useful to consider briefly the availability of negotiating damages in other areas of English private law.⁵ They have been awarded in actions for trespass to land in two categories of case. First, where the

* Reader, Sussex Law School.

¹ *One Step (Support) Ltd. v. Morris-Garner* [2018] UKSC 20, [2019] AC 649 (appeal taken from Eng.).

² The term was coined in *Lunn Poly Ltd. v. Liverpool & Lancashire Props. Ltd.* [2006] EWCA (Civ) 430, [2007] L & TR 6 [22] and adopted in *Pell Frischmann Eng’g Ltd. v. Bow Valley Iran Ltd.* [2009] UKPC 45, [2011] 1 WLR 2370 [48].

³ See *Morris-Garner* [2018] UKSC 20, [2019] AC 649 [30], [54], [95].

⁴ For some scholars, negotiating damages do not compensate loss, but are based on the gain made by the defendant, see *infra* note 100, or are a substitute for the right infringed, ROBERT STEVENS, TORTS AND RIGHTS 67–68 (2009); DAVID WINTERTON, MONEY AWARDS IN CONTRACT LAW 201–14 (2017). A discussion of the nature or calculation of negotiating damages is beyond the scope of this article.

⁵ For a detailed account, see JAMES EDELMAN, MCGREGOR ON DAMAGES 14-016–033 (20th ed. 2018).

defendant has wrongfully used the claimant's land, the claimant is entitled to a "wayleave" award, whether or not the claimant would have made use of the land. A key case is *Whitwham v. Westminster Brymbo Coal & Coke Co.*⁶ Over eight years, the defendant tipped spoil from its colliery onto the neighboring land owned by the plaintiff. The Court of Appeal held that the plaintiff was entitled not only to compensation for the diminution in value that the spoil had caused to the land but also to a wayleave award reflecting the value of using the land for dumping waste. Secondly, "mesne profit" awards reflecting the letting value of the property have been made where a tenant wrongfully stayed in occupation of the property after the end of the lease. These circumstances were present in *Swordheath Properties Ltd. v. Tabet*.⁷ The Court of Appeal held that the landlord was entitled to a mesne profit award reflecting the letting value of the property, whether or not the landlord would have let the property to someone else had the defendant not been in occupation.

Negotiating damages have also been awarded in actions for wrongful interference with goods. A key case is *Strand Electric & Engineering Co. Ltd. v. Brisford Entertainments Ltd.*⁸ A theatre hired portable switchboards from the plaintiff. When the defendant took over the theatre, it refused to return the switchboards to the plaintiff and kept them in use. In an action for detinue, the Court of Appeal awarded the plaintiff the full market rate of hire of such switchboards for the whole period of detention. It was held immaterial that only 75 percent of the plaintiff's stock was out on hire at any one time and that stock was sometimes loaned free of charge or accidentally destroyed.

Where an intellectual property right is infringed culpably (i.e., the defendant knew, or had reasonable grounds to know, that he engaged in infringing activity), legislation provides that damages "may be awarded on the basis of the royalties or fees which would have been due had the defendant obtained a licence."⁹ The same principle has been recognized at common law, as demonstrated by the Scottish case *Watson, Laidlaw & Co.*

⁶ *Whitwham v. Westminster Brymbo Coal & Coke Co.* (1896) 2 Ch 538. Other Court of Appeal authority includes *Eaton Mansions (Westminster) Ltd. v. Stinger Compania De Inversion SA* [2013] EWCA (Civ) 1308, [2014] HLR 4; *Enfield LBC v. Outdoor Plus Ltd.* [2012] EWCA (Civ) 608, [2012] CP Rep 35; *Severn Trent Water Ltd. v. Barnes* [2004] EWCA (Civ) 570, (2004) 2 EGLR 95; *Lawson v. Hartley-Brown* (1996) 71 P & CR 242.

⁷ *Swordheath Props. Ltd. v. Tabet* (1979) 27 P & CR 327. Other Court of Appeal authority includes *ParkingEye Ltd. v. Beavis* [2015] EWCA (Civ) 402, [2015] RTR 27 [50]; *Viscount Chelsea v. Hutchinson* (1996) 28 HLR 17; *Ministry of Defence v. Ashman* (1993) 25 HLR 513; *Ministry of Defence v. Thompson* (1993) 25 HLR 552.

⁸ *Strand Elec. & Eng'g Co. v. Brisford Entm'ts Ltd.* [1952] 2 QB 246; *see also Mediana (Owners) v. Comet (Owners) (The Mediana)* [1900-03] All ER 126; *Watson, Laidlaw & Co. v. Pott, Cassels & Williamson* [1914] SC 18 (HL) 31 (Lord Shaw); *Kuwait Airways Corp. v. Iraqi Airways Co. (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883 (HL) [87].

⁹ Intellectual Property (Enforcement, etc.) Regulations 2006, SI 2006/1028, ¶ 3(2)(b) (UK).

Ltd. v. Pott, Cassels & Williamson.¹⁰ The defender sold machines infringing the pursuers' patent. The House of Lords held that the pursuers were entitled to damages in respect of sales which the defender had made in a territory in which the pursuers themselves could not have traded. Lord Shaw recognized a principle of "price or hire" applying in all cases of wrongful interference with property.¹¹ Negotiating damages are also available in actions for breach of an equitable duty of confidence¹² but are unlikely to be awarded in actions for breach of privacy.¹³

II. NEGOTIATING DAMAGES IN ENGLISH CONTRACT LAW BEFORE *ONE STEP (SUPPORT) LTD. V. MORRIS-GARNER*

The first English case in which negotiating damages were awarded in an action for breach of contract is *Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd.*¹⁴ The defendant developer built houses on land in breach of a restrictive covenant, registered as a land charge, which made the development of the land subject to approval by the owner of the neighboring land (the plaintiff). In an action for breach of contract (which is the type of action used for the enforcement of a restrictive covenant) against the defendant and the purchasers of the houses, the plaintiff sought an injunction but not an interlocutory injunction. By the time of the trial, the houses had been completed and were occupied by the purchasers. Judge Brightman refused to grant a mandatory injunction for the demolition of the buildings.¹⁵

He awarded damages under what is known as Lord Cairns' Act,¹⁶ which provides that a court with jurisdiction to grant an injunction or specific performance may award damages in addition to, or in substitution for, such specific relief. Judge Brightman said that while the value of the plaintiff's land was not diminished at all, the defendant should not retain all of the fruits of its wrongdoing.¹⁷ Referring to the above-mentioned user principle in tort, he said that even though the plaintiff would never have consented to any development of the land, a just substitute for an injunction was a sum of money that the plaintiff might reasonably have demanded from the defendant

¹⁰ *Watson, Laidlaw & Co.* [1914] SC (HL) 18.

¹¹ *Id.* at 31; *see also* *Rickless v. United Artists Corp.* [1986] FSR 502, 524–25 (for copyright); *General Tire & Rubber Co. v. Firestone Tyre & Rubber Co.* [1975] 1 WLR 819, 826 (for patent).

¹² *Marathon Asset Mgmt. LLP v. Seddon* [2017] EWHC (Comm) 300, [2017] ICR 791 [261]; *CF Partners (UK) LLP v. Barclays Bank PLC* [2014] EWHC (Ch) 3049 [1195].

¹³ *See* *Douglas v. Hello! Ltd.* (No 3) [2005] EWCA (Civ) 595, [2006] QB 125 [246].

¹⁴ *Wrotham Park Estate Co. v. Parkside Homes Ltd.* [1974] 1 WLR 798.

¹⁵ *Id.* at 811.

¹⁶ Chancery Amendment Act 1858, 21 & 22 Vict. c.27, s 2 (UK). The same provision is now in section 50 of the Senior Courts Act 1981 c.54 (UK).

¹⁷ *Wrotham Park Estate Co.* [1974] 1 WLR 798, 812.

for a relaxation of the covenant.¹⁸ He awarded five percent of the profit the defendant had anticipated to make from the development.¹⁹

In *Attorney General v. Blake*,²⁰ where the House of Lords (with the dissent of Lord Hobhouse) held that an account of profits may exceptionally be awarded in an action for breach of contract, Lord Nicholls, giving the leading speech, expressed the view that negotiating damages are based on the benefit gained by the wrongdoer from the breach, rather than any loss suffered by the victim.²¹ His Lordship approved the decision in *Wrotham Park*, describing it as a “solitary beacon.”²² This endorsement of *Wrotham Park* prompted the courts to award negotiating damages not only for breach of a restrictive covenant over land under Lord Cairns’ Act²³ but also for breach of other contractual obligations under Lord Cairns’ Act²⁴ and at common law.²⁵

An important example is *Experience Hendrix LLC v. PPX Enterprises Inc.*²⁶ The parties settled a dispute over the copyright in certain Jimi Hendrix songs by agreeing that the defendant was entitled to fulfill existing licenses over those songs but was not permitted to grant new licenses without the consent of the estate of Jimi Hendrix. The defendant deliberately granted new licenses without such consent. The claimant, to whom the benefit of the settlement agreement had been assigned, sued the defendant for breach of that agreement, seeking an injunction to restrain further breaches and damages. An injunction was granted. With regard to damages for past breaches, the claimant conceded that it had no evidence to show any financial loss resulting from those breaches, but contended that it was entitled to negotiating damages in the amount that the claimant could reasonably have demanded for relaxing the prohibition against the grant of further licenses.²⁷ Relying on *Wrotham Park* and *Blake*, the Court of Appeal held that

¹⁸ *Id.* at 813–15.

¹⁹ *Id.* at 816.

²⁰ *Att’y Gen. v. Blake* [2001] 1 AC 268.

²¹ *Id.* at 278–83.

²² *Id.* at 283, where he also disapproved of the Court of Appeal’s decision in *Surrey Cty. Council v. Bredero Homes Ltd.* [1993] 1 WLR 1361 insofar as it was inconsistent with *Wrotham Park*. The Court of Appeal had followed *Wrotham Park* in *Jaggard v. Sawyer* (1995) 1 WLR 269.

²³ *Amec Devs. Ltd. v. Jury’s Hotel Mgmt. (U.K.) Ltd.* [2002] TCLR 13, (2001) 82 P & CR 22 [11].

²⁴ See, e.g., *Pell Frischmann Eng’g Ltd. v. Bow Valley Iran Ltd.* [2009] UKPC 45, [2011] 1 WLR 2370 (breach of a contractual duty of confidentiality); *Lunn Poly Ltd. v. Liverpool & Lancashire Props. Ltd.* [2006] EWCA (Civ) 430, [2007] L & TR 6 (landlord’s breach of the covenant for quiet enjoyment).

²⁵ See, e.g., *Lane v. O’Brien Homes Ltd.* [2004] EWHC 303 (QB) (common law damages for breach of a collateral contract not to build on certain land, which was not registered as an interest in land).

²⁶ *Experience Hendrix L.L.C. v. PPX Enters. Inc.* [2003] EWCA (Civ) 323, [2003] FSR 46.

²⁷ In the alternative, the claimant sought an account of profits in accordance with *Blake*. The Court of Appeal held that the case was not sufficiently exceptional to warrant such an award.

negotiating damages should be awarded. The Court recognized that in *Wrotham Park* such damages were awarded in lieu of an injunction under Lord Cairns' Act. But the Court said that the assessment of damages for past breaches should not depend upon whether future breaches are restrained by an injunction, and *Blake* demonstrated that common law damages for breach of contract could also be measured by reference to the gain made by the contract-breaker.²⁸

Subsequently, in *WWF-World Wide Fund for Nature v. World Wrestling Federation Entertainment Inc.*, the Court of Appeal said that both an account of profits and an award of negotiating damages are compensatory, not gain-based, remedies and are available only where the claimant cannot demonstrate "identifiable financial loss."²⁹ In *Marathon Asset Management LLP v. Seddon*, Judge Leggatt said that both remedies are gain-based and that the Court of Appeal in *WWF* had used the term "compensatory" merely in the broad sense of redress for wrongdoing.³⁰ Judge Leggatt also held that in actions for breach of contract negotiating damages are available only where the contract protects a proprietary interest.³¹

III. *ONE STEP (SUPPORT) LTD. V. MORRIS-GARNER*—FACTS AND DECISION

The current rules on the availability of negotiating damages in English contract law were laid down by the UK Supreme Court in *Morris-Garner*.³² The claimant company provided supported living care for vulnerable children and adults. The defendants, who were a former director and shareholder and a former manager of the claimant, set up a business which also engaged in providing living care in the same areas in which the claimant operated. After the defendants had sold their business, the claimant sued the defendants for breach of restrictive covenants not to compete with the claimant, solicit its clients or use its confidential information, for a period of 36 months. The claimant produced reports by forensic accountants quantifying the loss the claimant had allegedly suffered as a result of the breach (between £3.4m and £4.6m), the benefits obtained by the defendants, and a hypothetical fee for releasing the defendants from the restrictions (between £5.6m and £6.3m).

²⁸ *Experience Hendrix L.L.C.* [2003] EWCA (Civ) 323, [2003] FSR 46 [34]–[35] (Mance LJ), [56]–[58] (Peter Gibson LJ). Hooper J agreed with both Mance LJ and Peter Gibson LJ.

²⁹ *WWF-World Wide Fund for Nature v. World Wrestling Fed'n Entm't Inc.* [2007] EWCA (Civ) 286, [2008] 1 WLR 445 [59] (Chadwick LJ speaking for the court).

³⁰ *Marathon Asset Mgmt. LLP v. Seddon* [2017] EWHC 300 (Comm), [2017] 2 CLC 182 [199]–[202].

³¹ *Id.* at [216], where he also observed that the interest of the claimant in *Experience Hendrix* could be characterized as proprietary or quasi-proprietary.

³² *Morris-Garner* [2018] UKSC 20, [2019] AC 649.

The trial judge found that the defendants were in breach of the non-competition and non-solicitation covenants, and held that, since it would be difficult for the claimant to identify the loss it had suffered as a result of the breach, the claimant should have the choice between an award of negotiating damages and an award of ordinary compensatory damages.³³ The claimant chose the former and a hearing on quantum was fixed. Before that hearing could take place, the defendants appealed. The Court of Appeal dismissed the appeal, holding that negotiating damages could be awarded in an action for breach of contract whenever this was a just response and not only where the case was exceptional or where the claimant could not demonstrate identifiable loss.³⁴

The Supreme Court unanimously allowed the defendants' appeal, holding that the hearing on quantum ordered by the judge should proceed for the quantification of the financial loss actually sustained by the claimant, and while it was for the trial judge to determine the relevance and weight of evidence in relation to a hypothetical release fee, such a fee was not itself the measure of the claimant's loss.³⁵ Separate judgments were delivered by Lord Reed JSC, with whom Baroness Hale PSC, Lord Wilson and Lord Carnwath JJSC agreed, by Lord Sumption JSC and by Lord Carnwath JSC.

Lord Reed JSC observed that Lord Cairns' Act damages awarded in lieu of an injunction are equitable in nature and are not necessarily measured in the same way as common law damages.³⁶ His Lordship also said that the courts had conceived of awards of negotiating damages as compensating for loss.³⁷ Crucially, Lord Reed JSC rejected the proposition that negotiating damages can be awarded whenever they appear to be a just response.³⁸

Lord Reed JSC confirmed that negotiating damages can be awarded under Lord Cairns' Act in substitution of specific relief (although this is not the only method of assessing Lord Cairns' Act damages). He said:

One possible method of quantifying damages under this head is on the basis of the economic value of the right which the court has declined to enforce, and which it has consequently rendered worthless. Such a valuation can be arrived at by reference to the amount which the claimant might reasonably have demanded as *quid pro quo* for the relaxation of the obligation in question. The rationale is that, since the

³³ *One Step (Support) Ltd. v. Morris-Garner* [2014] EWHC 2213 (QB), [107]–[108].

³⁴ *One Step (Support) Ltd. v. Morris-Garner* [2016] EWCA (Civ) 180, [2017] QB 1, A2/2014/2727 (appeal taken from QB).

³⁵ *Morris-Garner* [2018] UKSC 20, [2019] AC 649.

³⁶ *Id.* at [46]–[47].

³⁷ *Id.* at [79].

³⁸ *Id.* at [81], [97].

withholding of specific relief has the same practical effect as requiring the claimant to permit the infringement of his rights, his loss can be measured by reference to the economic value of such permission.³⁹

Lord Cairns' Act damages were not available in the case at hand, as no injunction had or could have been claimed, and Lord Reed JSC turned to the availability of negotiating damages at common law. His Lordship observed that "[c]ommon law damages for breach of contract are . . . normally based on the difference between the effect of performance and non-performance upon the claimant's situation."⁴⁰ But he recognized that there are circumstances in which an award of negotiating damages is compatible with the compensatory purpose of contractual damages. Lord Reed JSC said:

[S]uch circumstances can exist in cases where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed, as for example in cases concerned with the breach of a restrictive covenant over land, an intellectual property agreement or confidentiality agreement . . . The claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the asset in question. The defendant has taken something for nothing, for which the claimant was entitled to require payment.⁴¹

Lord Reed JSC added that the contractual right must be "of such a kind that its breach can result in an identifiable loss equivalent to the economic value of the right, considered as an asset," even in the absence of loss measurable in the ordinary way.⁴² A non-competition obligation is not of that kind, he said, as it is difficult to see how its breach could cause any loss other than loss resulting from the wrongful competition, such as loss of profit and goodwill, which is measurable by conventional means.⁴³

Lord Sumption JSC expressed the view that the cases in which negotiating damages had been awarded can be grouped into three categories. The first is where the claimant has an interest in the observance of his rights which extends beyond financial reparation.⁴⁴ This category comprises cases involving an invasion of property rights and *Blake*.⁴⁵ The second category is where, as in *Wrotham Park*, the relevant obligation was in principle

³⁹ *Id.* at [95].

⁴⁰ *Id.*

⁴¹ *Id.* at [92].

⁴² *Id.* at [93].

⁴³ *Id.*

⁴⁴ *Id.* at [109].

⁴⁵ *Id.* at [110]–[111].

specifically enforceable and the notional release fee is the price of non-enforcement.⁴⁶ The third category is where the claimant has (or may be assumed to have) suffered pecuniary loss and the notional release fee is treated as evidence of that loss, representing the value that reasonable people in the parties' position would place on the performance of the relevant obligation.⁴⁷ This category comprises patent infringement cases,⁴⁸ cases involving the breach of a contractual or equitable duty not to misuse confidential information,⁴⁹ and some other contractual cases such as *Experience Hendrix*.⁵⁰

Lord Carnwath JSC expressed agreement with Lord Reed JSC.⁵¹ He identified differences between the approaches of Lord Reed JSC and Lord Sumption JSC.⁵² He rejected the approach of Lord Sumption JSC, arguing that it conflicts with the previous development of the law (in particular, the fact that cases of patent infringement are carved out from Lord Sumption's first category), that it gave no clear indication of the circumstances falling within the third category, and that the third category blurred the difference between the concept of loss and the concept of a negotiated fee.⁵³

One important consequence of the Supreme Court's decision in *Morris-Garner* is that negotiating damages cannot be awarded for breach of a non-competition covenant unless the breach is ongoing when proceedings commence.⁵⁴ As *Morris-Garner* itself illustrates, the breach of a non-competition covenant has often ceased before an action is brought, as non-competition covenants are usually short in duration (to ensure their validity) and the defendant often proceeds surreptitiously, so that the period of restriction has expired by the time the claimant becomes aware of the breach and is in a position to take legal action.

⁴⁶ *Id.* at [109], [112].

⁴⁷ *Id.* at [109], [115].

⁴⁸ *Id.* at [116].

⁴⁹ *Id.* at [120].

⁵⁰ *Id.* at [121]–[122].

⁵¹ *Id.* at [127].

⁵² *Id.* at [130]–[131].

⁵³ *Id.* at [133]–[137].

⁵⁴ See *Keystone Healthcare Ltd. v. Parr* [2018] EWHC 1509 (Ch) [225]–[227].

IV. *ONE STEP (SUPPORT) LTD. V. MORRIS-GARNER*—CRITIQUE

The evaluation of the UK Supreme Court's decision in *Morris-Garner* will focus on Lord Reed's judgment, as all other law lords (except Lord Sumption JSC) agreed with him.⁵⁵

Lord Reed JSC laid down that in actions for breach of contract negotiating damages are available only in two categories of case. His Lordship therefore rejected the proposition, endorsed by the Court of Appeal in *Morris-Garner*, that in actions for breach of contract, negotiating damages may be awarded whenever the court regards such an award as a just response. It is useful to evaluate that proposition in general before examining in detail the two categories of case set out by Lord Reed JSC.

For more than 170 years, English courts have consistently said that “where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.”⁵⁶ The usual measure of contractual damages is therefore expectation loss, identified by comparing the claimant's actual position after the defendant's breach with the position the claimant would have been in had the defendant performed the contract.⁵⁷ An award of negotiating damages has a different aim. It places the claimant in the position, not as if the contract had been performed, but as if the contract had been replaced by a different contract. It would undermine the aim of contractual damages if negotiating damages could be awarded in actions for breach of contract simply because the court regards it as a just response.

A comparison with reliance damages illuminates the point. Reliance damages are calculated by reference to the position as if the contract had not been made. Since the method of their calculation does not reflect the aim of contractual damages of placing the claimant in the position as if the contract had been performed, reliance damages are not routinely available simply at the claimant's election. They are unavailable where their award would place the claimant in a better position than if the contract had been performed.⁵⁸ Reliance damages are available only as a subsidiary remedy where the defendant's breach of contract has made it impossible to calculate expectation loss and where it can be presumed that the claimant would at

⁵⁵ See Caspar Bartscherer, *Two Steps Forward, One Step Back: One Step (Support) LTD v Morris-Garner and Another*, 82 MODERN L. REV. 367, 372–76 (2019), for an illuminating critique of Lord Sumption's judgment.

⁵⁶ *Morris-Garner* [2018] UKSC 20, [2019] AC 649 [32]; *Ruxley Elecs. & Constr. Ltd. v Forsyth* [1996] AC 344, 355, 365; *Swingcastle Ltd. v. Alastair Gibson* [1991] 2 AC 223, 237; *Koufos v. C Czarnikow Ltd.* [1969] 1 AC 350, 414, 420; *Robinson v. Harman* (1848) 154 Eng. Rep. 363, 365; 1 Exch. 850, 855 (Parke B).

⁵⁷ *E.g.*, *Classic Maritime Inc. v. Limbungan Makmur SDN BHD* [2019] EWCA (Civ) 1102, [2019] 2 All ER (Comm) 592 [81].

⁵⁸ *C & P Haulage v. Middleton* [1983] 1 WLR 1461.

least have broken even had the contract been performed.⁵⁹ Reliance loss then constitutes the minimum amount of expectation loss.⁶⁰ Where expectation loss can be calculated, reliance damages are unavailable.⁶¹

Like reliance damages, negotiating damages ought to be unavailable where expectation loss can be compensated.⁶² Conversely, negotiating damages ought to be available “where the claimant may have difficulty in proving economic loss or where the claimant has a non-financial interest in upholding the right infringed that would not be reflected in a conventional award of damages.”⁶³ The view that in actions for breach of contract negotiating damages ought to be available if, and only if, there would otherwise be a remedial lacuna was taken by Singapore’s Court of Appeal in a decision rendered less than four months after the UK Supreme Court’s decision in *Morris-Garner*.⁶⁴

In *Morris-Garner*, Lord Reed JSC recognized that negotiating damages do not achieve the aim of contractual damages of placing the claimant in the position as if the contract had been performed.⁶⁵ While this might have justified the abolition of negotiating damages for breach of contract altogether,⁶⁶ his Lordship did not even limit their scope to circumstances where expectation damages cannot be awarded. He merely limited their scope to the two categories of case that he was setting out.⁶⁷ Thus, in a case falling into either or both of those categories, negotiating damages seem to be available even if an award of expectation loss could be made. In this respect, negotiating damages have a wider scope in English law than in Singaporean law.

Singapore’s Court of Appeal rejected a restriction of negotiating damages to the two categories of case laid down by the UK Supreme Court

⁵⁹ *Grange v. Quinn* [2013] EWCA Civ 24, [2013] 1 P & CR 279; *CCC Films (London) Ltd. v. Impact Quadrant Films Ltd.* [1985] QB 16.

⁶⁰ See ADAM KRAMER, *THE LAW OF CONTRACT DAMAGES* 1–41 (2d ed. 2017).

⁶¹ *Omak Maritime Ltd. v. Mamola Challenger Shipping Co. Ltd.* [2010] EWHC 2026 (Comm), [2011] Bus LR 212.

⁶² ANDREW BURROWS, *REMEDIES FOR TORTS, BREACH OF CONTRACT, AND EQUITABLE WRONGS* 331 (4th ed. 2019). But see Graham Virgo, *Gain-Based Remedies*, in *COMMERCIAL REMEDIES: RESOLVING CONTROVERSIES* 292, 304, 310–11 (Graham Virgo & Sarah Worthington eds., Cambridge Univ. Press 2017).

⁶³ BURROWS, *supra* note 62, at 331.

⁶⁴ *Turf Club Auto Emporium Pte Ltd. v. Yeo Boong Hua* [2018] SGCA 44, [2018] 2 SLR 655 [130], [173]–[74], [217]–[19] (Sing.) (where the Court also said that negotiating damages are unavailable where reliance damages can be awarded. This rule may not be appropriate where reliance loss is very small. A discussion of that issue is beyond the scope of this article.).

⁶⁵ *Morris-Garner* [2018] UKSC 20, [2019] AC 649 [91].

⁶⁶ William Day, *Restitutions for Wrongs: One Step Forwards, Two Steps Back?*, 26 *RESTITUTION L. REV.* 60, 67 (2018).

⁶⁷ *Morris-Garner* [2018] UKSC 20, [2019] AC 649 [91].

in *Morris-Garner*.⁶⁸ The first category is where the claimant has sought specific relief and the court denies the grant of specific relief on discretionary grounds and awards damages in lieu under Lord Cairns' Act. The second category is "where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed."⁶⁹ For each category, it will now be investigated whether its boundary is clear and defensible on principle. One thing should be noted at the outset. While the first category is defined by reference to a procedural event (the denial of specific relief), the second category is defined by reference to the type of right infringed. There is, thus, considerable overlap between the two categories.

Starting with the first category, its contours seem clear. It captures cases where the claimant has sought specific relief and the court, having jurisdiction to grant specific relief, denies the grant of specific relief on discretionary grounds and awards damages in lieu under Lord Cairns' Act. The specific relief sought and denied may be in respect of future wrongdoing (in particular, a prohibitory injunction restraining the defendant from engaging, or continuing to engage, in certain conduct in the future) or past wrongdoing (a mandatory injunction ordering the defendant to undo the effects of past wrongdoing). Thus, the damages awarded may compensate future or past loss.

When it comes to the justifiability of Lord Reed's first category on principle, it is necessary to distinguish between its inclusionary effect and its exclusionary effect. It is easy to see why negotiating damages should be available in cases falling within the first category. By denying specific relief, the court in effect permits the defendant to engage in the wrongful conduct (in the case of future conduct)⁷⁰ or permits the consequences of the defendant's wrongful conduct to subsist (in the case of past conduct). To that extent, the claimant is in effect deprived of the right infringed. Negotiating damages may be regarded as the fee that the defendant pays to the claimant in return for the court giving the defendant "permission" to infringe the claimant's right.⁷¹ It is similar to a compulsory license over a patent, where the state compels the patentee to grant a license to a particular person in return for a royalty.⁷²

It is less easy to see why negotiating damages should be unavailable (leaving aside Lord Reed's second category) only because specific relief has not been claimed. An attempt to justify this by reference to the scope of application of Lord Cairns' Act would fail for two reasons. First, it is by no

⁶⁸ *Turf Club Auto Emporium Pte Ltd* [2018] SGCA 44, [2018] 2 SLR 655 [278]–[86] (Sing.).

⁶⁹ *Morris-Garner* [2018] UKSC 20, [2019] AC 649 [92] (Lord Reed JSC).

⁷⁰ *Jaggard v. Sawyer* [1995] 1 WLR 269, 286 (Millet LJ).

⁷¹ *See Att'y Gen. v. Blake* [2001] 1 AC 268, 281 (Lord Nicholls).

⁷² Patents Act 1977, ss 48–48B (UK).

means clear that the applicability of the Act requires an application for specific relief. Such a requirement has been rejected in some cases,⁷³ although Lord Reed JSC in *Morris-Garner* expressed doubts.⁷⁴ Secondly, it is difficult to see why the availability of negotiating damages should depend upon whether damages are awarded under Lord Cairns' Act or at common law.⁷⁵ Lord Cairns' Act was enacted when the common law and the rules of equity were administered by different courts. The Act aimed to ensure that a claimant whose claim for specific relief had been denied by the Court of Chancery, and who wished to obtain damages, did not have to start new proceedings in the common law courts but could obtain damages immediately from the Court of Chancery.⁷⁶ The purpose of the Act was predominantly procedural,⁷⁷ and it is difficult to see why a certain measure of damages should be available under the Act but not at common law or vice versa. Considering the historical aim of the Act, the measure of damages under the Act should generally be the same as at common law, which used to be accepted.⁷⁸ It is surprising that Lord Reed JSC in *Morris-Garner* said that an identical measure of damages "is hardly to be expected."⁷⁹

The unavailability of negotiating damages (leaving aside Lord Reed's second category) is particularly difficult to justify where the reason for the absence of a claim for specific relief is that the claimant reasonably expects that specific relief would be denied on discretionary grounds. Millett LJ in *Jaggard v. Sawyer* supported the applicability of Lord Cairns' Act in those circumstances by saying: "It would be absurd to require [the claimant] to include a claim for an injunction if he is sufficiently realistic to recognize that in the circumstances he is unlikely to obtain one."⁸⁰ It would be equally absurd to require the claimant to include a claim for specific relief that is bound to be denied, for the sole purpose of rendering negotiating damages available. They should be available in those circumstances under Lord Cairns' Act (if it is considered applicable) and at common law. By denying them in the absence of a claim for specific relief, the decision in *Morris-*

⁷³ E.g., *Pell Frischmann Eng'g Ltd. v. Bow Valley Iran Ltd.* [2009] UKPC 45, [2011] 1 WLR 2370 [48].

⁷⁴ *Morris-Garner* [2018] UKSC 20, [2019] AC 649 [45].

⁷⁵ See *Turf Club Auto Emporium Pte Ltd v. Yeo Boong Hua* [2018] SGCA 44, [2018] 2 SLR 655 [286] (Sing.).

⁷⁶ *Ferguson v. Wilson* (1866) 2 Ch App. 77, 88.

⁷⁷ The Act does have some substantive effects, as it empowers the court to award damages in respect of a threatened wrong, *Leeds Industrial Co-operative Society Ltd v. Slack* [1924] AC 851, and damages for breach of a contract enforceable in equity but not at common law, *Price v. Strange* [1978] Ch 337, 358.

⁷⁸ *Johnson v. Agnew* [1980] AC 367, 400.

⁷⁹ *Morris-Garner* [2018] UKSC 20, [2019] AC 649 [47].

⁸⁰ *Jaggard v. Sawyer* [1995] 1 WLR 269, 285 (adding that the claimant needs to expressly invoke the Act).

Garner gives claimants an incentive to make a futile claim for specific relief.⁸¹

Where the court has no jurisdiction to grant specific relief because the wrong ceased before the start of the proceedings and its effects cannot be undone, Millett LJ in *Jaggard v. Sawyer* regarded Lord Cairns' Act as inapplicable and rejected the availability of negotiating damages at common law on the ground that the claimant's bargaining position has been destroyed and his right devalued.⁸² Millett LJ was adopting the conceptualization of negotiating damages as compensation for a lost opportunity to bargain.⁸³ Whatever the merits of that conceptualization, the problem with Millett LJ's argument is that the claimant's bargaining position will not be much stronger⁸⁴ in the case of an ongoing wrong if it is clear that an application for specific relief would be denied on discretionary grounds. Yet, negotiating damages are available in the latter case if specific relief is being sought. Moreover, a defendant who has engaged in wrongful conduct without seeking the claimant's permission may be said to have appropriated a "license" and ought to face being liable to pay a notional license fee in the same way as a defendant who is granted a "compulsory license" by the court.⁸⁵ Where the claimant became aware of the defendant's wrongful conduct while it was still ongoing but unreasonably delayed commencing proceedings, negotiating damages are likely to be restricted to the loss suffered before the date by which the claimant acting reasonably could have obtained an (interim) injunction⁸⁶ and might be denied altogether.⁸⁷

Andrew Burrows argues that where the wrong is neither anticipated nor ongoing and all losses are in the past, the unavailability of negotiating damages is understandable because they "might be thought especially appropriate where they obviate the need, in assessing compensatory

⁸¹ Paul S. Davies, *One Step Backwards: Restricting Negotiating Damages for Breach of Contract*, LLOYD'S MAR. & COM. L.Q. 433, 440 (2018).

⁸² *Jaggard* [1995] 1 WLR 269, 291.

⁸³ See Robert J. Sharpe & S. M. Waddams, *Damages for Lost Opportunity to Bargain*, 2 OXFORD J.L. STUD. 290 (1982). But see Andrew Burrows, *Are "Damages on the Wrotham Park Basis" Compensatory, Restitutionary or Neither?*, in CONTRACT DAMAGES: DOMESTIC AND INTERNATIONAL PERSPECTIVES 169–71 (Djakhongir Saidov & Ralph Cunnington eds., Hart 2008); Ralph Cunnington, *The Measure and Availability of Gain-Based Damages for Breach of Contract*, in CONTRACT DAMAGES: DOMESTIC AND INTERNATIONAL PERSPECTIVES 220–22 (Djakhongir Saidov & Ralph Cunnington eds., Hart 2008).

⁸⁴ It may be slightly stronger due to uncertainty as to the court's eventual decision on specific relief.

⁸⁵ See Davies, *supra* note 81, at 439–40.

⁸⁶ See *Lime Free Water & Gen. Servs. Ltd. v. Econowash Ltd.*, [1981] 5 WLUK 27; *Uzinterimpex JSC v. Standard Bank PLC* [2008] EWCA (Civ) 819, [2008] 2 Lloyd's Rep 456 [55]; see also Alvin W-L See, *User Damages and the Limits of Compensatory Reasoning*, LLOYD'S MAR. & COM. L.Q. 73, 93–95 (2018).

⁸⁷ See Bartscherer, *supra* note 55, at 376.

damages, to speculate as to the future.”⁸⁸ This is not entirely convincing. The assessment of past loss requires the court to determine what would have happened without the defendant’s wrong, and an inquiry into the hypothetical may be as difficult as to determine what will happen in the future. Furthermore, even where the wrong is neither anticipated nor ongoing and all losses are in the past, negotiating damages are available if, as happened in *Wrotham Park*, a mandatory injunction to undo the effects of the wrong has been denied on discretionary grounds.

The unavailability of negotiating damages for breach of contract (leaving aside Lord Reed’s second category) can be justified where the court has no jurisdiction to grant specific relief and the reason for this is that damages, assessed in an orthodox way (and not by reference to a hypothetical release fee⁸⁹), are adequate.⁹⁰ Damages are adequate in this context where substitute performance is available in the market.⁹¹ The cost of substitute performance constitutes expectation loss.⁹² As explained earlier, negotiating damages ought to be unavailable where expectation damages can be awarded. It should be noted that damages are typically inadequate where the obligation breached is a negative obligation (an obligation not to perform a certain act), as substitute performance by a third party is not possible.

Turning to Lord Reed’s second category, its scope in relation to breach of contract is not immediately clear. His Lordship said that the contractual right must be “of such a kind that its breach can result in an identifiable loss equivalent to the economic value of the right, considered as an asset, even in the absence of any pecuniary losses which are measurable in the ordinary way.”⁹³ This definition is very abstract, and it is not immediately clear what types of contractual right fall within the second category and what types do not. The scope of the category may be inferred from cases that Lord Reed JSC expressly assigned to it. Outside contract, the second category comprises wrongful interference with goods or land, infringement of intellectual property rights, and the equitable wrong of breach of confidence. With regard

⁸⁸ Andrew Burrows, *One Step Forward?*, 134 L.Q. REV. 515, 519 (2018); see also BURROWS, *supra* note 62, at 329; *supra* note 86, at 86–92.

⁸⁹ In determining whether damages are inadequate, opening the jurisdiction to award specific relief, the potential availability of negotiating damages must be ignored. See *One Step (Support) Ltd. v. Morris-Garner* [2016] EWCA (Civ) 180, [2017] QB 1 [133]. If the availability of negotiating damages depends upon the court having jurisdiction to grant specific relief, that jurisdiction cannot itself depend upon whether negotiating damages are available.

⁹⁰ For the inadequacy of damages as a pre-condition of granting specific relief, see *Lawrence v. Fen Tigers Ltd.* [2014] UKSC 13, [2014] AC 822 [159], [171] (for injunctions); *Co-Operative Ins. Soc’y Ltd. v. Argyll Stores (Holdings) Ltd.* [1998] AC 1, 11 (for specific performance).

⁹¹ *Mungalsingh v. Juman* [2015] UKPC 38, [2016] 1 P & CR 7 [33]; *Cavendish Square Holding BV v. Makdessi* [2015] UKSC 67, [2016] AC 1172 [30].

⁹² *E.g.*, *Bunge SA v. Nidera BV* [2015] UKSC 43, [2015] 3 All ER 1082 [77]–[79].

⁹³ *One Step (Support) Ltd. v. Morris-Garner* [2018] UKSC 20, [2019] AC 649 [93].

to breach of contract, Lord Reed JSC gave as examples “a right to control the use of land, intellectual property or confidential information.”⁹⁴ His Lordship approved of the decision in *Experience Hendrix* mentioned above:

The agreement gave the claimant a valuable right to control the use made of PPX’s copyright. When the copyright was wrongfully used, the claimant was prevented from exercising that right, and consequently suffered a loss equivalent to the amount which could have been obtained by exercising it.⁹⁵

In every example given by Lord Reed JSC, the defendant promised not to engage in certain conduct: not to make certain use of certain land, not to make certain use of certain intellectual property, or not to make certain use of certain confidential information. This indicates that only a negative obligation can fall into the second category. But the second category does not comprise all negative obligations, as Lord Reed’s rejection of negotiating damages for breach of a non-competition clause demonstrates. Lord Reed’s examples demonstrate that the second category is confined to promises not to make use of a certain asset. Tangible property, intangible property, and confidential information are all assets. A non-competition clause does not involve the promise not to make use of a certain asset. Even if a business or the goodwill of a business is regarded as an asset,⁹⁶ wrongful competition does not make use of that asset; it simply damages it.

There is uncertainty as to what counts as an asset in this context. Suppose that a company, which plans to take photos of a certain area from the air (which is assumed to be lawful), enters into a contract with the owner of a parcel of land in that area and promises not to take photos of that particular parcel of land. Views may differ on whether the breach of such a promise amounts to making use of the land. Or suppose that a celebrity enters into a contract with a media organization under which the latter promises not to take photos of the celebrity in particular circumstances (which the media organization would otherwise be free to do). Views may differ on whether the right to privacy constitutes an asset in the present context.

Moreover, it is difficult to see why the availability of negotiating damages for the breach of a negative obligation should depend upon whether the obligation relates to some asset.⁹⁷ Such a restriction may be justifiable if

⁹⁴ *Id.*

⁹⁵ *Id.* at [89].

⁹⁶ See *Turf Club Auto Emporium Pte Ltd. v. Yeo Boong Hua* [2018] SGCA 44, [2018] 2 SLR 655 [282] (Sing.); BURROWS, *supra* note 62, at 330; Man Yip & Alvin W-L See, *One Step Away from Morris-Garner: Wrotham Park Damages in Singapore*, 135 L.Q. REV. 36, 39 (2019).

⁹⁷ See BURROWS, *supra* note 62, at 330–31; Burrows, *supra* note 88, 520–21; Jonathan Chew, *Wrotham Out: Negotiating Damages After One Step v Morris-Garner*, 4 CONV. & PROP. L. 386, 393 (2018).

negotiating damages are seen as being based on the gain made by the defendant rather than as constituting compensation for loss. Many theories on the types of wrong for which gain-based relief should be available at common law require the infringement of a proprietary or quasi-proprietary right⁹⁸ or the infringement of an exclusive entitlement (at least as between the parties) to exploit an asset.⁹⁹ A number of commentators have argued that a hypothetical license fee is properly to be characterized as being gain-based and not compensatory in nature.¹⁰⁰ However, Lord Reed JSC in *Morris-Garner* was adamant that negotiating damages are compensatory in nature.¹⁰¹ If they do compensate for the loss of the right to control the defendant's conduct, it is difficult to see why that conduct needs to amount to the use of an asset.¹⁰²

A comparison between a confidentiality agreement and a non-competition agreement illustrates the point. Both were present in *Morris-Garner*, and Lord Reed JSC said that the breach of the confidentiality covenant, considered in isolation, might have brought the case within the second category of case in which negotiating damages are available but that the trial judge had regarded the breach of the non-competition and non-solicitation covenants as the most significant.¹⁰³ It is unsatisfactory that Lord Reed JSC simply deferred to a prioritization made by the trial judge, who could not foresee that the Supreme Court would distinguish between the various courses of action in respect of the availability of negotiating damages.¹⁰⁴

Consider the following example. X is employed by company Y, which over time has built up confidential business information, for example a large database of customers' personal details. Using this information in breach of his employment contract with Y, X sets up a rival business. The availability of negotiating damages under Lord Reed's second category depends upon the type of negative obligation breached by X. If the employment contract

⁹⁸ E.g., Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504 (1980); Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQ. L. 1 (2000); Sarah Worthington, *Reconsidering Disgorgement for Wrongs*, 62 MOD. L. REV. 218 (1999).

⁹⁹ See SIRKO HARDER, *MEASURING DAMAGES IN THE LAW OF OBLIGATIONS: THE SEARCH FOR HARMONISED PRINCIPLES* 215–42 (2010).

¹⁰⁰ E.g., JAMES EDELMAN, *GAIN-BASED DAMAGES: CONTRACT, TORT, EQUITY AND INTELLECTUAL PROPERTY* 68–71 (2002); Burrows, *supra* note 83, at 165; Cunningham, *supra* note 83, at 225–27; Craig Rotherham, “Wrotham Park Damages” and *Accounts of Profits: Compensation or Restitution?*, LLOYD'S MAR. & COM. L.Q. 25 (2008).

¹⁰¹ See *Morris-Garner* [2018] UKSC 20, [2019] AC 649 [79].

¹⁰² The asset requirement would be equally unjustifiable if negotiating damages were seen as compensating non-pecuniary loss, as done by Adam Kramer. KRAMER, *supra* note 60, at 22–23.

¹⁰³ *Morris-Garner* [2018] UKSC 20, [2019] AC 649 [17], [99].

¹⁰⁴ Davies, *supra* note 81, at 439.

contains only a confidentiality covenant, negotiating damages are available. If the employment contract contains only a non-competition covenant, negotiating damages are not available. If the employment contract contains both a confidentiality covenant and a non-competition covenant, the availability of negotiating damages depends upon which covenant is more significant, and it is unclear how this is to be determined. Where a confidentiality covenant is present, the additional presence of a non-competition covenant lowers Y's protection. This is difficult to justify.

In conclusion, it is difficult to find a principled justification for a restriction of negotiating damages in actions for breach of contract to the two categories of case set out by the UK Supreme Court in *Morris-Garner*. The remedy should be available whenever the claimant would otherwise obtain only nominal damages. It should make no difference whether the award is made under Lord Cairns' Act or at common law. Furthermore, contrary to what Lord Reed JSC in *Morris-Garner* suggested,¹⁰⁵ it is difficult to see how using the amount of a hypothetical license fee as evidence of the claimant's expectation loss is helpful or appropriate in cases in which negotiating damages are unavailable.¹⁰⁶

V. CONCLUSION

After the decision by the House of Lords in *Attorney General v. Blake*, negotiating damages (damages measured by reference to the amount of a notional release fee) flourished in English contract law. This development culminated in the Court of Appeal in *Morris-Garner* holding that negotiating damages can be awarded in actions for breach of contract whenever the court regards such an award as a just response. The Supreme Court in *Morris-Garner* rolled back that development and gave negotiating damages in English contract law a more restrictive scope.

On principle, negotiating damages should not be available in actions for breach of contract simply because the court regards such an award as a just response. It has long been established that contractual damages aim to place the claimant in the position as if the contract had been performed. Negotiating damages do not place the claimant in that position but in the position as if the contract had been replaced by a different contract. It does not follow that negotiating damages should never be awarded in actions for breach of contract. An award of negotiating damages is an appropriate way of avoiding a remedial lacuna where the amount of expectation loss cannot be determined.

¹⁰⁵ *Morris-Garner* [2018] UKSC 20, [2019] AC 649 [94], [100].

¹⁰⁶ Davies, *supra* note 81.

The Supreme Court in *Morris-Garner* regarded the presence of a remedial lacuna neither as necessary nor as sufficient for the availability of negotiating damages in actions for breach of contract. Instead, the Court set out two overlapping categories of case in which the remedy can be awarded. While the first category is defined by reference to certain procedural events, the second category is defined by reference to the type of right infringed.

The first category comprises cases in which all of the following three requirements are satisfied: the court has jurisdiction to grant specific relief, the claimant has applied for specific relief, and the court denies specific relief on discretionary grounds. In those circumstances, the availability of negotiating damages is justified, as the court in effect compels the claimant to grant the defendant a license and the defendant ought to pay a license fee. But if this is accepted, it is difficult to see why negotiating damages should be unavailable only because the claimant has not applied for specific relief or only because the defendant's wrongful conduct ceased prior to the commencement of proceedings. In those sets of circumstances, the defendant may be said to have appropriated a license and should face the prospect of having to pay a license fee. The exclusion of negotiating damages is justifiable where damages calculated in an orthodox way are adequate (because substitute performance by a third party is available), as there is no remedial lacuna.

The second category of case in which the Supreme Court in *Morris-Garner* regarded negotiating damages as available is where the defendant has breached an obligation not to use an asset of the claimant or not to use that asset in a certain manner. This includes at least the wrongful use of tangible property, intellectual property, or confidential information. It does not include the breach of a non-competition or non-solicitation clause. If negotiating damages are characterized as being based on the gain made by the defendant, as opposed to the loss suffered by the claimant, the restriction of the second category to the wrongful use of an asset may have merit. However, the Supreme Court in *Morris-Garner* was adamant that negotiating damages compensate loss, namely the loss of the claimant's right to restrict the defendant's conduct. But if negotiating damages are characterized in that way, their restriction to the wrongful use of an asset, as opposed to every breach of a negative obligation, cannot be justified.

The two categories of case set out by the Supreme Court in *Morris-Garner* correspond to the two jurisdictional bases of awarding damages for breach of contract. While the first category involves an award of damages under the modern equivalent of Lord Cairns' Act, the second category involves an award of damages at common law. But the circumstances in which negotiating damages are available in an action for breach of contract should not depend upon the jurisdictional basis of the award. Lord Cairns' Act facilitated the procedure of awarding damages at a time when the rules

of equity and the rules of the common law were still administered by different courts. It should not have a substantive effect today.

Thus, the Supreme Court's decision in *Morris-Garner* is unsatisfactory. While it may have clarified the law, it drew demarcation lines that cannot be justified on principle. It may also have awkward consequences in practice. In cases in which it is clear that the court, having jurisdiction to grant specific relief, will deny specific relief on discretionary grounds, claimants now have an incentive to make a futile claim for specific relief for the sole purpose of rendering negotiating damages available. Furthermore, in cases that do not fall into the second category, most notably the breach of a non-competition covenant, negotiating damages are available only if proceedings are commenced while the wrong is still ongoing. There is, thus, an incentive for litigation and a disincentive for out-of-court settlement.

A contracting party that negotiates for a non-competition covenant (or any other obligation falling outside the second category laid down by the Supreme Court in *Morris-Garner*) in its favor may now wish to negotiate also for a clause in the contract which provides that in the event of breach the innocent party has the option to claim a notional release fee instead of damages assessed in the ordinary way. In a contract between two businesses,¹⁰⁷ such a clause is unlikely to constitute an unenforceable penalty as a notional release fee should rarely be out of proportion to the innocent party's legitimate interest in the other party's performance of the primary obligations under the contract.¹⁰⁸

¹⁰⁷ Every term (other than a core term) in a contract between a business and a consumer is subject to the control of unfair contract terms under Part 2 of the Consumer Rights Act 2015 (UK). A term that purports to provide the business with additional remedies in the case of breach by the consumer may be unfair. See Consumer Rights Act 2015, sch. 2, ¶¶ 5, 6 (UK).

¹⁰⁸ *Cavendish Square Holding BV v. Makdessi* [2015] UKSC 67, [2016] AC 1172; see Sirko Harder, *The Rule Against Contractual Penalties in Great Britain and Ireland*, 11 EUR. J. COMM. CONT. L. 1, 9–10 (2019).